

1 CHARLENE M. MORROW (CSB NO. 136411)  
cmorrow@fenwick.com  
2 VIRGINIA K. DEMARCHI (CSB NO. 168633)  
vdemarchi@fenwick.com  
3 RACHAEL G. SAMBERG (CSB NO. 223694)  
rsamberg@fenwick.com  
4 KIMBERLY I. CULP (CSB NO. 238839)  
kculp@fenwick.com  
5 SALAM RAFEEDIE (CSB NO. 250191)  
srafeedie@fenwick.com  
6 FENWICK & WEST LLP  
Silicon Valley Center  
7 801 California Street  
Mountain View, CA 94041  
8 Telephone: (650) 988-8500  
Facsimile: (650) 938-5200

9 Attorneys for Plaintiff  
10 JOBY, INC.

11  
12 UNITED STATES DISTRICT COURT  
13 NORTHERN DISTRICT OF CALIFORNIA  
14 SAN FRANCISCO DIVISION  
15

16 JOBY, INC.,

17 Plaintiff,

18 v.

19 TOCAD AMERICA, INC.,

20 Defendant.  
21

Case No. 3:07-CV-06455 (SI)

**DECLARATION OF JOEBEN BEVIRT  
IN SUPPORT OF JOBY, INC.'S  
MOTION FOR A PRELIMINARY  
INJUNCTION**

**Date: May 2, 2008**  
**Time: 2:00 p.m.**  
**Courtroom: 10, 19th Floor**  
**The Honorable Susan Illston**

22 I, JoeBen Bevirt, declare as follows:

23 1. I am the Founder and President of Joby, Inc. I make this declaration based upon  
24 my personal knowledge, and if called upon to testify, could and would testify competently to the  
25 matters set forth below.

26 2. I have a master's degree in mechanical engineering from Stanford University.  
27 While I was studying for my graduate degree, I came up with the idea for a flexible tripod with  
28

1 rotating joints that would allow the tripod to be used in locations where conventional, rigid-leg  
2 tripods could not be used. I founded Joby in 2005 to further develop and produce this flexible  
3 camera tripod.

#### 4 **Joby's Gorillapod**

5 3. Joby has its headquarters in San Francisco, California, and currently employs 44  
6 people worldwide. The company's first product was the Gorillapod – a tripod with flexible legs  
7 that enable it to secure itself to virtually any surface anywhere, such as a tree branch, a pole, or  
8 jagged rock. I have attached as Exhibit A images of the Gorillapod secured to these kinds of  
9 surfaces.

10 4. Joby wanted the tripod's look and its name to suggest nimble, creature-like  
11 qualities. We chose an animal name – “Gorillapod” – for the product, and I designed its exterior  
12 to make it look like a little animal. The Gorillapod has a body section and three legs made of  
13 rounded segments (or “balls”) connected together. Each of the segments in the legs has a ring  
14 around the middle in a color that contrasts with the color of the segment, and each segment ends  
15 in a rounded “foot.” The rounded body, the rounded leg segments, the rounded feet, the  
16 proportions we selected for the body, legs and feet, and the contrasting rings give the tripod a  
17 playful, striped look. The contrasting colors on the feet and the rings also serve to highlight the  
18 tripod's movements.

19 5. Joby's first Gorillapod was designed to support a compact digital camera. An  
20 early prototype of the original-size Gorillapod was shown at the Consumer Electronics Show held  
21 in Las Vegas in January 2006. We began offering this Gorillapod for sale in February 2006. At  
22 that time, there was one other flexible tripod on the market, which looked something like the  
23 tripod shown in Exhibit B, but professional and amateur photographers alike relied primarily on  
24 conventional, rigid-leg tripods, such as the tripod shown in Exhibit C. None of the tripods then  
25 being marketed to the general public, or to professional photographers, looked anything like the  
26 Gorillapod.

27 6. In August 2006, Joby began offering a larger tripod, the Gorillapod SLR, which  
28 can support video cameras and lightweight SLR cameras weighing up to 1.75 lbs. In October

1 2006, we added the Gorillapod SLR-Zoom, which can support professional SLR cameras with  
2 zoom lenses weighing up to 6.6 lbs. The original Gorillapod can also be used with handheld  
3 devices (such as cell phones and PDAs), and the Gorillapod SLR can also be used with camera  
4 accessories (such as a flash). Currently, the Gorillapod is sold in three different sizes and six  
5 different color combinations, as shown in Exhibit D. The Joby name appears on the face of the  
6 round quick release button on the top portion of every Gorillapod.

7 7. All versions of the Gorillapod are made using high-quality plastic and rubber.  
8 They are molded using custom tooling and a double-injection process that minimizes the “flash”  
9 (*i.e.* excess material that protrudes between the two surfaces of the mold) on the finished product  
10 and produces a secure bond between the plastic and rubber. We invested a significant amount of  
11 time and effort trying to find a factory that could manufacture our product to meet our quality  
12 specifications. We tried four different factories before we found one that could produce the high  
13 quality product we wanted.

#### 14 **The Gorillapod’s Success**

15 8. The Gorillapod has been extremely successful. To date, Joby has sold more than  
16 one million Gorillapods since its first sale in February 2006. The product is sold through Joby’s  
17 own online store (www.joby.com), through well-known camera equipment retailers, such as  
18 Adorama and B&H Photo-Video, and through other well-known retailers, such as Best Buy,  
19 Amazon.com, Eddie Bauer, Red Envelope and REI. The Gorillapod is also sold through camera  
20 and outdoor equipment distributors worldwide. It is sold in both packaged and unpackaged  
21 forms. Joby uses clear plastic in its packaging, so that the Gorillapod is visible to the purchaser  
22 when the product is sold in packaged form. Inside the packaging, the Gorillapod is wrapped  
23 around a cardboard “branch,” and the back of the packaging includes images of the Gorillapod in  
24 action (*e.g.*, perched on a rock). I have attached as Exhibit E a sample of the original Gorillapod  
25 in its packaging.

26 9. Joby has also invested heavily in advertising and promotion of the Gorillapod.  
27 Since February 2006, Joby has shown the Gorillapod at seventeen trade shows and spent over  
28 \$1 million on advertising and promotion of the Gorillapod. In addition, our distributors and

1 retailers, with financial incentives provided by Joby, have spent an estimated \$500,000 to  
2 advertise and promote the Gorillapod. This advertising and promotion always includes images of  
3 the Gorillapod and typically emphasizes the product's fun, animal-like qualities, as in the  
4 animation on the home page of Joby's web site at www.joby.com, for example. I have attached  
5 as Exhibit F a screen capture of Joby's home page.

6 10. The Gorillapod has received enthusiastic reviews and extensive press coverage  
7 during the past two years. Since its launch in early 2006, the Gorillapod has been featured in over  
8 30 reviews and articles in a wide range of media geared to photography buffs, such as Popular  
9 Photography, Shutterbug, Outdoor Photographer and Amateur Photographer, and to the general  
10 public, such as CNET, Gizmodo.com, Wired Magazine, National Geographic and The New York  
11 Times. The Gorillapod has also been featured on popular television programs, such as Good  
12 Morning America and The Rachel Ray Show. A collection of the reviews and articles about the  
13 Gorillapod are attached as Exhibit G. A collection of the videos about the Gorillapod are attached  
14 as Exhibit H.

15 11. Even during the product's first nine months, before Toca introduced its flexible  
16 tripod, the Gorillapod enjoyed great success. From February through October 2006, Joby sold  
17 approximately 160,000 Gorillapods and received rave reviews from, among others, CNET,  
18 Popular Photography, Shutterbug, Wired Magazine and Gizmodo.com. The tripod was also  
19 featured on the television program Good Morning America. During the first nine months after  
20 launch of the Gorillapod, we promoted the product at four trade shows and spent approximately  
21 \$178,000 on advertising and promotion in print and in other media. All of the articles, reviews,  
22 advertising and promotion included images of the Gorillapod and mentioned the Joby company  
23 name.

#### 24 **Toca's Knock-Off of the Gorillapod**

25 12. Toca introduced its knock-off of the Gorillapod, called the FlexPod, in late 2006.  
26 I carefully examined a sample of the FlexPod. The quality of this product is inferior to Joby's  
27 Gorillapod. The FlexPod looks just like the Gorillapod, but it uses a low quality, cheaper plastic  
28 than what we use for the Gorillapod. The molding of the FlexPod is sloppy, which produces

1 excessive flash and causes the rubber to not bond well to the plastic, which in turn tends to cause  
2 the rubber rings to fall off.

3 13. After Tocad started selling its FlexPod, Joby began corresponding with Tocad  
4 through counsel about the patent and trade dress issues associated with Tocad's product. While  
5 we were having this exchange with Tocad I learned that Tocad planned on redesigning its  
6 product. Rather than moving forward with a lawsuit against Tocad at that point, we chose to see  
7 if the redesign would address our concerns.

8 14. In late October 2007, Tocad introduced its new flexible tripod, the FlexPod Plus.  
9 The new FlexPod looks much the same as the earlier FlexPod, and copies the overall design Joby  
10 created for the Gorillapod, but it uses a different mechanical design. The FlexPod Plus is made  
11 with an aluminum wire core. I got a sample of the FlexPod Plus shortly after it was introduced,  
12 and I examined it, too. I found that the aluminum core used in the product's legs could be easily  
13 broken, just by bending the leg back and forth several times. In fact, when I visited Tocad's  
14 booth at the Photo Marketing Association show in Las Vegas this year, I picked up a sample of  
15 the FlexPod Plus that was displayed on the counter at the booth. I noticed that the joint at the top  
16 of one of the legs where it attaches to the body of the tripod was broken. In my view, the FlexPod  
17 Plus is an inferior quality product compared to the Gorillapod.

18 15. After I saw the FlexPod Plus, it was clear at that point that Tocad's redesign would  
19 not address our concerns about its use of the Gorillapod trade dress. We filed our complaint  
20 shortly thereafter, on December 21, 2007. I am very concerned that Tocad's inferior tripods,  
21 because they look so much like Joby's Gorillapod, will harm Joby's business and especially its  
22 reputation for providing high-quality, innovative products.

23 I declare under penalty of perjury under the laws of the United States of America that the  
24 foregoing is true and correct. Executed on this 27 day of March, 2008.

25  
26 

27 JOEBEN BEVIRT  
28